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## Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana

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# IRAQ, CAMBODIA, AND INTERNATIONAL JUSTICE

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## INTRODUCTION

I plan to discuss the dynamics between the introduction of international humanitarian law and human rights in the context of two fledgling war crimes courts created within the national judicial systems of Iraq and Cambodia—two countries not noted for their adherence to human rights norms in the past. The experiences in Iraq and Cambodia are important because the future implementation of

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international humanitarian law, at least so far as judicial enforcement is concerned, probably lies in national or hybrid courts located at the scene of the conflicts and inevitably embedded in the cultural and political backdrop of the individual countries.

The experience in the Special Court of Sierra Leone, discussed elsewhere in this symposium,<sup>1</sup> is also informative but different. In the Sierra Leone Special Court, a majority of judges are international, chosen by the United Nations, and the mode of trial follows that of the *ad hoc* tribunals and the International Criminal Court ("ICC"); a basically adversarial, common-law mode of trial familiar to Westerners. In Iraq and Cambodia, the majority—or in Iraq's case the totality—of the judges as well as most of the prosecutors and staff are indigenous. The law applied—except for the definitions of the universal crimes and some ancillary provisions taken from international humanitarian law—is predominantly the law of each respective country, not international law.

Two critical questions arise from this scenario. First, can these courts function independently and efficiently in their native habitats? And second, will their presence require or precipitate the recognition and enforcement of significant human rights norms formerly rejected or ignored in the regular court national systems? This is an early point at which to make any confident assessment, but not too early to present some significant signals worth mentioning.

## I. IRAQ'S SPECIAL TRIBUNAL

The Iraqi Special Tribunal ("IST") was established at the end of 2003 in a law ("IST Statute") passed first by the Coalition Provisional Authority and later re-passed by the Iraqi interim government.<sup>2</sup> The Iraqi Parliament has recently passed the IST Statute with some amendments as official national law. Iraqi expatriates and Americans reportedly drafted the original IST Statute

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1. See, e.g., David M. Crane, *Terrorists, Warlords, and Thugs*, 21 AM. U. INT'L L. REV. 505 (2006).

2. Statute of the Iraqi Special Tribunal, art. 15, Dec. 10, 2003, 43 I.L.M. 231 (2004) [hereinafter IST Statute].

and in large part it copies the charters of the *ad hoc* tribunals<sup>3</sup> and the International Criminal Court (“ICC”)<sup>4</sup> with some crucial exceptions I will discuss. The international community wanted a more internationalized court—either an *ad hoc* tribunal like the International Criminal Tribunal for the former Yugoslavia (“ICTY”) or International Criminal Tribunal for Rwanda (“ICTR”), or at least one with significant participation by international judges and personnel and one approved by the U.N., such as the Sierra Leone Special Court. Instead, the IST Statute provides for Iraqi judges only, although there is a provision that a non-Iraqi judge may be appointed if deemed necessary, but it has not happened and my surmise is that it will not. The IST has jurisdiction only over Iraqi nationals who have committed genocide, crimes against humanity and war crimes (along with several national crimes such as wastage of natural resources, manipulation of the judiciary and abuse of policies leading to war against Arab neighbors) committed between 1968 and the end of the Iraq invasion in May 2003.<sup>5</sup> The IST must follow Iraqi criminal procedure law, except as set out in the IST law itself or its Revised Rules of Procedure and Evidence (“IST Rules”).<sup>6</sup>

I believe it fair to say that the majority of international humanitarian law concepts adopted by the *ad hoc* court charters and the ICC are present in the IST Statute and Rules—at least in the last versions I have seen. Here I note that many of these provisions are human rights norms as well as international humanitarian law principles and I make no pretense at being able to draw sharp

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3. *E.g.*, Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]. For a version of the ICTY Statute incorporating all subsequent amendments, see Amended Statute of the International Criminal Tribunal, <http://www.un.org/icty/legaldoc-e/basic/statut/stat11-2004.htm>. For a version of the ICTR Statute incorporating all subsequent amendments, see Statute of the International Tribunal for Rwanda, <http://www.ohchr.org/english/law/itr.htm>.

4. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute].

5. IST Statute, *supra* note 2, arts. 10-14, 43 I.L.M. at 236-41.

6. *See generally* Revised Version of Iraqi Special Tribunal Rules of Procedure and Evidence, *entered into force* Dec. 23, 2004 [hereinafter IST Rules of Procedure], *available at* <http://www.iraqispecialtribunal.org/en/laws/rules.htm>.

distinctions. Thus, we see in the IST Statute and IST Rules provisions that there will be no immunity granted for official positions (there were such immunities under prior Iraqi penal law); the Nuremberg obedience orders defense is rejected, and the principle of command responsibility is accepted.

Article 20 of the IST law sets out the usual rights of the accused found in war crimes tribunal charters: rights to public trial (except for those parts where victim protection or national security deem otherwise, an exception found in all these tribunals); rights to a presumption of innocence; notice of charges; to counsel, assigned if the accused cannot pay for his own; to prompt trial, to mount a defense and to obtain witnesses; to confront evidence against him; and not to be compelled to testify against himself or to have such refusal enter into any determination of guilt (again a change in Iraqi law which allowed a court to draw inferences from a defendant's refusal to answer its questions).<sup>7</sup>

The court is also required to write a reasoned opinion for its decision, and there is a right to appeal a sentence or conviction to an appeals chamber.<sup>8</sup> There are guarantees against being tried for the same acts twice (unless the first trial was a sham).<sup>9</sup> The IST Rules require pretrial disclosure of the prosecutor's evidence (any exceptions must be by judicial order) and the prosecutor is mandated to disclose any material exculpatory or in mitigation of guilt to the accused.<sup>10</sup> The IST Rules stress the independence of the judges who must take no instructions from other parts of the government (or anyone else) as well as their duty to refrain from deciding cases in which they have financial or personal interests or past involvement.<sup>11</sup>

#### A. VOICED SHORTCOMINGS IN THE IST FRAMEWORK

Human rights groups such as Amnesty International and Human Rights Watch have, however, objected to the Iraqi Special Tribunal on several bases, some grounded in human rights doctrine, some in

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7. IST Statute, *supra* note 2, art. 20(b)-(d), 43 I.L.M. at 244.

8. *Id.* arts. 23(b), 25, 43 I.L.M. at 245-46.

9. *Id.* art. 30(a)-(b), 43 I.L.M. at 247.

10. IST Rules of Procedure, *supra* note 6, Rs. 61-62.

11. *Id.* R. 11.

what appear to be more pragmatic concerns that Iraqi judges are just not up to the job of deciding complex, prolonged cases involving international humanitarian law doctrines to which they have only recently been exposed in “crash” training courses.<sup>12</sup> The deal-breaker for most of the groups is the allowance of the death penalty, something which, incidentally, the American advisers did not want (Paul Bremer suspended it while he was in charge), but the Iraqis demanded. This inclusion brought on the condemnation of the United Nations, as well as the European Union members and a myriad of international NGOs. The omission of the death penalty may or may not be a human rights canon, but for these purposes it is treated as such. Thus the U.N., most EU countries (except the UK) and NGOs have refused to provide any assistance to the IST, and the U.N. has forbidden its personnel serving in other tribunals from giving advice or training to native Iraqi IST judges. (The ICC happily has not so enjoined its people.)

This boycott has some ironic effects insofar as any goal of international humanitarian law bringing in its wake human rights advances in hostile countries. The IST Statute requires that in each branch of the Tribunal—investigative, trial and appeal—as well as in the offices of the Prosecutor and Defense, there be appointed non-Iraqi advisers and observers to provide non-partisan, expert advice and recommendations,<sup>13</sup> particularly in the area of international norms. Thus far (except for the American advisers on-site) only one such adviser from the UK is serving in that capacity. One must wonder if this “to the wall” approach, cutting off a potential source of international law advice, ends up being counterproductive to the introduction of human rights law into the court.

Similarly, another article in the IST Statute tells Iraqi judges they may resort to relevant decisions of international courts as persuasive authority for their interpretations of the international crimes of genocide, crimes against humanity, and war crimes.<sup>14</sup> Of course, those decisions are still being translated into Arabic and even if that

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12. See, e.g., Amnesty Int’l, *Iraqi Special Tribunal—Fair Trials Not Guaranteed*, May 12, 2005.

13. IST Statute, *supra* note 2, arts. 6(b), 7(n), 43 I.L.M. at 233-34.

14. *Id.* art. 17(b), 43 I.L.M. at 243.

monumental task<sup>15</sup> is completed in time for some of the trials (Saddam Hussein's first trial began in October 2005), the length and complexity of many of the decisions will likely present a high hurdle for novitiate Iraqi judges; international advisers would have been compelling assets for them to consult. This, too, has human rights consequences for, in fact, it is the jurisprudence of the *ad hoc* tribunals that has in effect joined international humanitarian law and human rights at the hip. Rarely is there an international court decision that interprets international humanitarian law in a way that does not encompass relevant human rights law as well. A prime example is the wholesale adoption of the International Covenant of Civil and Political Rights ("ICCPR")<sup>16</sup> guarantees to the accused in international humanitarian law as practiced in the *ad hoc* tribunals. I am told that the most recent version of the Iraqi Tribunal law permits the judges to bring down judgments based on national law, such as murder, instead of a war crime or crime against humanity. Given inadequate access to international expertise, Iraqi judges may be drawn to this path.

Other parts of the IST Statute and Rules call for consideration of international law—both international humanitarian law and human rights law. The law instructs judges in imposing penalties for the universal crimes to consider "relevant international precedent."<sup>17</sup> While this instruction is necessarily vague given the lack of refined sentencing criteria in the *ad hoc* tribunals and even in the ICC law (which is somewhat more detailed on sentencing), the reference would still be the basis for ruling out bizarre or cruel and inhumane punishments—apart from the death penalty—surely an area human rights activists care about. Finally, the IST Rules require the Administrator in charge of detention to issue rules that preserve

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15. Compare Nathan J. Brown & Clark B. Lombardi, *The Supreme Constitutional Court of Egypt on Islamic Law, Veiling and Civil Rights: An Annotated Translation of Supreme Constitutional Court of Egypt Case No. 8 of Judicial Year 17 (May 18, 1996)*, 21 AM. U. INT'L L. REV. 437, 439 (2006), which reviews the unique challenges in translating case law from Arabic to English, in light of the linguistic distinctions, and inherent stylistic and expressive differences.

16. G.A. Res. 2200, at 52, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

17. IST Statute, *supra* note 2, art. 24(e), 43 I.L.M. at 246.

“human rights” in detention,<sup>18</sup> again a place where non-Iraqi advisers might have been quite significant.

## B. BEYOND THE DEATH PENALTY

In all fairness, critics of the Iraqi Tribunal expressed several concerns other than the death penalty. Yet, after participating in dialogues between the critics and the Iraqi judges and prosecutors (and their American supporters), I was left with the impression that these other items could well have been resolved. In some cases, the critics (primarily NGOs) were using a “super-standard” that characterized virtually all operational facets of the *ad hoc* and ICC courts as human rights requirements, and perhaps ignored in some cases the fact that those tribunals themselves had some of the deficiencies they found unacceptable in the case of Iraq. That point notwithstanding, there is no doubt that a few areas the critics cite are cause for concern. I will now consider the most meritorious of those concerns.

### 1. *The Presence of Counsel*

The IST Statute and Rules insist that an accused must have counsel present when questioned by an investigative judge.<sup>19</sup> But they do not say anything about police questioning before that appearance, or generally about access to counsel in detention (which can last up to 180 days). The Iraqi judges assured us that under their own national law, police had to bring an arrestee before the judge promptly and that counsel had ready access to the client thereafter. However, without linguistic access to the Iraqi code or knowledge of whether or how it is adhered to in practice, human rights activists are right to worry. Further, one has also to ask whether *Miranda*<sup>20</sup> is tantamount to international human rights law even though the rules of both the ICTY and ICC provide counsel at questioning in all stages of investigation and prosecution for an accused or targeted suspect.

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18. See IST Rules of Procedure, *supra* note 6, R. 30(3).

19. *Id.* R. 46; IST Statute, *supra* note 2, art. 18(c), 43 I.L.M. at 243.

20. See *Miranda v. Arizona*, 384 U.S. 436 (1966).



## 2. Evidentiary Concerns

The kinds of evidence that may be used at trial has also posed a problem for opponents. Although the formula for admissible evidence—anything that is relevant and probative<sup>21</sup>—parallels that used in the other tribunals, the civil law procedures put a new cast on it. They envision a nonpublic investigation supervised by an investigative judge who looks for both incriminating and exculpatory evidence, interviews witnesses and seeks out evidence in proceedings that do not include the defendant, although the judge may allow the defense to participate and offer evidence.<sup>22</sup> At the end of the investigation stage, the judge prepares a dossier and decides whether to indict. If he does so, the dossier becomes the centerpiece of the ensuing trial although both sides may call and examine and cross-examine witnesses in this second stage. But the dossier itself may contain evidence which the defense has not been able to contest at the time of original questioning, but which the trial judges can consider. This is of course a staple of a different mode of trial, unfamiliar to Anglo-Saxon procedure but probably not rising to a human rights issue. Our own hearsay rules are not enshrined in international law and indeed are not uniformly followed in the other tribunals. Actually, the IST Rules have more explicit restraints on hearsay than in other tribunals in that they provide that admission of hearsay evidence should take account of the availability of the declarant to testify and circumstantial guarantees of trustworthiness.<sup>23</sup>

One omission from the IST Statute and Rules has provoked criticism and should be easily altered if, as the Iraqi judges proclaim, it is already a staple of basic Iraqi law. That is the need for an explicit guarantee against the use of evidence which has been obtained by torture or inhumane treatment. The Iraqis say their code now makes the use of torture to induce confessions illegal—but it is unclear if that prevents use of the confession at trial. The current IST Rules say that admissibility should depend on “whether the means by which the evidence [is] obtained casts substantial doubt on its

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21. IST Rules of Procedure, *supra* note 6, R. 79(3).

22. *Id.* Rs. 42-43.

23. *Id.* R. 79(5)(3).

reliability;”<sup>24</sup> this formulation falls short of the other tribunals’ ban against evidence that is “inimical to the integrity” of the court. This gap should be easily remediable given the will and incentive to do so.<sup>25</sup>

### 3. Judicial Impartiality

The most troublesome aspect of the IST procedures that, in my view, implicates human rights—the most important right of all in any trial—is the right to independent and impartial judges. Although that right appears in the law, it is common knowledge that members of the Prime Minister’s cabinet embarked on a campaign to dismiss nineteen of the judges and key staff and to bring the court under the wing of the Judicial Council, a body dominated by the Executive and allegedly used in Saddam Hussein’s regime to control the courts. They did so on the basis that the targeted judges and personnel had at one time been members of the Baath Party and the IST Statute requires that no judicial officer or staff member could have been affiliated with the former Baath party.<sup>26</sup> (In other courts only higher-level officials of the Baath Party have been disqualified from judicial positions.) Many of the IST judges (and their American advisers) saw this as a direct assault on the new court’s independence although some of the older judges did not. Since a parliamentary amendment is necessary to delete this ban (and, incidentally, here the NGOs agree that total party membership disqualification is unjust

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24. *Id.* R. 79(5)(4).

25. Some complain that the IST Rules do not explicitly require the reasonable doubt standard for guilt. *See, e.g.,* Hum. Rts. Watch, *The Iraqi Special Tribunal, Rules of Procedure and Evidence Missing Key Protections*, Apr. 22, 2005. However, there is an explicit guarantee of the presumption of innocence which international law has declared to implicitly mean reasonable doubt. The Iraqis say that is their standard, and indeed neither the ICTY Charter nor the black letter law of the ICCPR use the reasonable doubt phrase, though the Commentary to Article 14 of the ICCPR uses it and the ICTY Rules proclaim it. There is also an ambiguity concerning whether trial *in absentia* is permitted. Article 20 of the IST Statute guarantees an accused a right to a trial in his presence, but Rule 57 of the Iraqi Rules says he can be tried according to Iraqi law, which appears to allow trial *in absentia* under some circumstances. In any case, it is not clear that trial *in absentia* is a human rights violation per se or in all circumstances and is practiced in many Continental countries.

26. IST Statute, *supra* note 2, art. 33, 43 I.L.M. at 248.

discrimination as compared to a case-by-case assessment), a critical reevaluation of the IST would have been in order if a majority of judges and key staff had been dismissed and replaced on this ground. For the moment, the problem seems to have gone away, due to behind-the-scenes lobbying and negotiations.

#### *4. Assassination as a True Impediment*

An even greater obstacle to the trials has arisen since the first one began in the autumn of 2005. Two defense counsel have been assassinated, another severely injured, and a “plot” to kill the judges unearthed (one investigative judge was killed months earlier). The killings provoked an initial boycott by the defense attorneys until negotiations satisfied their understandable desire for enhanced security. Still, the question looms whether international justice and human rights can survive in the midst of a violent insurgency on-site or whether, as with the ICTY, removal to a more distant site is necessary.

#### C. A SIGNIFICANT OPPORTUNITY THAT SHOULD NOT BE OVERLOOKED

These are my summary conclusions on Iraqi war crimes trials. The basic IST Statute and Rules—with a few exceptions—follow international humanitarian law tenets closely, at least in the English version I have seen. A significant opportunity for international input in human rights as well as international humanitarian law advances in Iraq may be lost because of the dispute, principally over the death penalty. International humanitarian law and human rights have been melded in the other war crimes tribunals and that meld could constructively be brought into Iraqi law and practice. The IST judges—dozens of them—will rejoin the pool of regular judges when the Tribunal is over and could significantly impact national criminal procedures through their experience on the Tribunal. In countries like Rwanda and Sierra Leone, there has been a much noted and lamented gap between the quality of justice in the international war crimes tribunal and the regular courts. In the Iraqi type of national court, the gap has a better chance of being closed. We know already it is technically possible to try war crimes consistent with international humanitarian law’s substantive definitions while avoiding many of

the human rights oriented procedures used in the *ad hoc* ICC tribunals. That has indeed been the chief allegation leveled at the U.S. military commission tribunals in Guantanamo. The international tribunal experience thus far has been different, however, in joining the two bodies of law. Personally, I fear any continued boycott of Iraq's Tribunal along with its own politically based fight for independence from Executive control may result in a missed opportunity to further the melding of international humanitarian law and human rights in international criminal law. I hope I am wrong.

## II. CAMBODIA

After many years of frustrating on-again-off-again negotiating with the United Nations, Cambodia arrived at an agreed format for a tribunal to try the surviving leaders of the 1975-1979 Khmer Rouge regime that oversaw the starvation, torture, execution, and mass displacement of more than two million Cambodian citizens. The Cambodian Parliament subsequently passed a law creating an Extraordinary Chamber ("KRT") to prosecute and try the most senior and most responsible perpetrators of these atrocities, by now consisting of only a dozen and a half aged men, most unlikely to last many more years.<sup>27</sup>

### A. THE KHMER ROUGE TRIBUNAL AND THE EXTRAORDINARY CHAMBERS LAW

The KRT will be a national court employing Cambodian law except where inconsistent with international law or where international law is necessary to fill *in lacunae* in national law. It will have a majority of Cambodian judges, but a minority of judges picked by the government from a list of U.N. nominees (three Cambodian and two international judges in the trial court; four

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27. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (2001) (Cambodia), *as amended* by NS/RKM/1004/006 (Oct. 27, 2004) (unofficial translation, Council of Jurists) [hereinafter Extraordinary Chambers Law], *available at* <http://www.cambodia.gov.kh/krt/pdfs/KR%20Law%20as%20amended%2027%20Oct%202004%20Eng.pdf>; *see also* Khmer Rouge Trials, G.A. Res. 228, 57th Sess., U.N. Doc. A/RES/57/228 (Feb. 27, 2003).

Cambodian and three international judges in the appeals court).<sup>28</sup> Like Iraq, it will use the civil law mode of trial and there will be international and Cambodian co-prosecutors and co-investigative judges. No judicial decision of any consequence can be made without the consent of at least one international judge.<sup>29</sup> If the co-prosecutors or co-investigative judges disagree on an indictment, a panel of five judges will decide. If they cannot agree, the case will go forward. The KRT expects to try only a dozen or so high-level leaders and to terminate within three years. Its internal regulations are still being drafted by a Cambodian Task Force. Cambodia has no death penalty so the Tribunal will impose only maximum life sentences and minimum five-year prison sentences. Foreign donors, principally Japan, will provide the major financing. The United States is not opposed to the Tribunal, but has not done much of anything to actively support it. The trials will be held on a former military base on the outskirts of Phnom Penh.<sup>30</sup>

The Cambodian KRT law has all the required ingredients for U.N. approval; judges are required to be independent and to take no instructions; they must have experience in criminal law or international law, including international humanitarian law and human rights law.<sup>31</sup> The accused has the usual ICCPR guarantees of public trials, against self-incrimination, and presumption of innocence (Cambodia is a signatory to the ICCPR as well as the

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28. Extraordinary Chambers Law, *supra* note 27, arts. 10-11.

29. Due to the composition of the courts, with the Trial Chamber having three Cambodian judges and two international judges, and the Supreme Court Chamber having four Cambodian Judges and three international judges, all decisions will require at least one international judge vote. *Id.* art. 14(1) (requiring the affirmative vote of at least four judges in the Trial Chamber and at least five judges in the Supreme Court Chamber). *But see id.* art. 46 (permitting the appointment of additional domestic judges in the extraordinary circumstance that suitable international candidates are not available or offered after the exhaustion of a long set of procedural requirements).

30. Because it is following Cambodian law, the KRT has a peculiar problem. In regular Cambodian courts, victims can process their own claims for reparations in the context of the criminal case. How to do this for cases involving thousands of victims presents a problem, especially since reparations can only come from the perpetrators' assets unless a special victims fund is created.

31. *Id.* art. 10.

Rome Statute).<sup>32</sup> The definitions of crimes to be tried—genocide, crimes against humanity, war crimes—parallel the other tribunals;<sup>33</sup> additionally the court can try destruction of cultural property and crimes against internationally protected persons. It will cost \$20 million a year and local NGOs are involved in locating witnesses and evidence and doing outreach to inform citizens of the tribunals and encourage their attendance and oversight.

Forging the connection between international humanitarian law and human rights in Cambodia is not so much a matter of legislation as it is of enforcement. A perusal of Cambodian criminal law—on paper—will demonstrate that most of the human rights that advocates believe should be involved in the criminal process already exist, in theory. The KRT law gives suspects the right to counsel including any interrogation during the investigative stage.<sup>34</sup> The law also says the trial court shall exercise its jurisdiction in accord with international standards of justice, fairness, and due process as set out in the ICCPR.<sup>35</sup> And no amnesty will be given to anyone convicted under the law (though the validity of a prior amnesty against one of the leading perpetrators convicted in a “sham” trial of 1979 by the Peoples Revolutionary Court is left up to the current court).

Cambodia is a joiner—it is a party to the Rome Statute,<sup>36</sup> Convention on the Elimination of All Forms of Racial Discrimination (“CERD”),<sup>37</sup> Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”),<sup>38</sup> the Convention Against Torture and Other Cruel, Inhuman or Degrading

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32. *Id.* art. 35 (noting how the guarantees given to the accused are construed in accordance with Article 14 of the ICCPR).

33. There are minor differences, for instance, in the genocide definition which has transposed “as such” to “such as,” thereby changing its scope, but this is reported to be a translation error. *See id.* arts. 4-5. The definition omits incitement to genocide as a crime, but retains conspiracy which the ICC definition has dropped.

34. *Id.* art. 24.

35. *Id.* art. 33 (referring specifically to ICCPR Articles 14 and 15).

36. Rome Statute, *supra* note 4.

37. G.A. Res. 2106, at 47, U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014 (Dec. 21, 1965).

38. G.A. Res. 180, at 33, U.N. GAOR, 34th Sess., U.N. Doc. A/RES/34/80 (Jan. 22, 1980).

Treatment or Punishment,<sup>39</sup> the Convention of the Rights of the Child,<sup>40</sup> and many more international agreements. Cambodian law excludes evidence if gathered illegally. The KRT law provides explicitly for defense challenges to evidence even during the investigative stage; conversations between lawyer and client are guaranteed confidentiality and can not be monitored; treatment of detainees is to be in conformity with U.N. standards; confessions obtained by duress are null and void. Police detention is limited to forty-eight hours before an appearance is required before the investigating judge. Guilt is tied specifically to a "beyond reasonable doubt" standard. The one human right in some question is whether any inference can be drawn from a suspect's refusal to answer questions of the court.

### B. CONCERNS ABOUT FAIR TRIALS

Human rights advocates inside and outside of Cambodia are worried—with some justification—about the capacity of the KRT to provide fair trials. It is no secret that the reputation of the regular courts for impartial justice (and independence from the Executive Branch) is badly tarnished; seemingly blatant violations have occurred right up to the present day, including removal and reassignment of cases from troublesome judges to more compliant ones. Human Rights Watch has concluded, "The judicial system remain[s] extremely weak and generally unable to deliver justice to those whose human rights [are] violated."<sup>41</sup> Security officials have been accused of torturing detainees; prison conditions are poor; the media is subject to intimidation; elections are often manipulated and accompanied by political violence.

The operation of a legitimate war crimes court as part of a judiciary with such fundamental problems will take considerable effort. If the provisions of the KRT law are scrupulously honored, it can happen—but, again, that will highlight the endemic chasm

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39. G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984).

40. G.A. Res. 25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989).

41. Hum. Rts. Watch, *World Report 2003*, at 208, available at <http://www.hrw.org/wr2k3/pdf/cambodia.pdf>.

between internationalized and purely domestic courts in deficient systems. Cultural change does not come easily, especially if there is no will for it at the top levels of government, and questions have been raised about that will in Cambodian cases.

What it will take to demonstrate the will in Cambodia's cases is first the appointment of Cambodian judges who refuse to indulge in either bribes or governmental instruction. The announcement that the KRT judges will receive \$65,000 a year (an astronomical sum in Cambodia where regular judges get several hundred dollars a month) should act as somewhat of a buffer against economic seduction in that regard. The prosecutor, who drives the engine of investigation and case presentation, must of course also be independent and in control of the judicial police who will execute the investigations. But the international presence in the form of tiebreaker judges nominated by the U.N. is absolutely critical; these judges must not only be competent but they must be aggressively watchful and willing to speak up when any signs of government or other outside control appear. Although the principal defense counsel must be Cambodian, international lawyers may assist them and a debate is now waging as to whether the out-of-country lawyers can actually speak in court or only through the Cambodian lawyers. If international lawyers are freed up to do the latter, they can act as vital overseers of the integrity of the process. NGOs—Cambodian and international—must also be active court watchers and mobilizers of the citizenry to keep the court front and center in the public's eye.

Cambodia presents a unique challenge to the advance of international humanitarian law in countries with deficient judicial systems. There cannot and will not be an international court or ICC availability for every post-war conflict or transitional government. And when countries like Cambodia finally get to the point of agreeing to an acceptable law governing trial of these universal crimes, how should the international community react? Help them until it is clear they are not acting in good faith, or insist on basic and realistically unlikely reforms in the general human rights conditions before such a court will be assisted?

It is also noteworthy that the kind of problems confronted in Cambodia are in effect a preview of what the ICC may frequently face in its own complementarity decisions about whether a State is



able or willing to do its own cleanup work in trying international crimes, and whether or at what stage the international community will help or abandon them. The reality of future international justice may be at stake.